A

JAAFAR MOHD KHALID

v.

HONG LEONG BANK BHD

B

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-2576-10-2012]

C

28 JUNE 2013

TORT: *Negligence - Banks - Plaintiff's default as guarantor to repay loan sum - Judgment in default obtained in Sessions Court - Bankruptcy proceeding - Annulment of receiving and adjudicating orders - Whether*
D *bank owed plaintiff a duty of care - Whether a commercial relationship existed between bank and plaintiff - Whether bank negligent in processing loan documents - Whether signature in agreement was that of plaintiff - Whether plaintiff could have sued bank for fraud instead of negligence - Whether claim time-barred - Whether plaintiff could rely on s. 29(a)*
E *Limitation Act 1953*

TORT: *Malicious prosecution - Elements of tort - Plaintiff's default as guarantor to repay loan sum - Bankruptcy proceeding - Receiving and adjudicating orders - Annulment and recession - Whether plaintiff*
F *prosecuted based on a criminal charge - Tort of malicious civil proceedings - Whether reasonable and probable cause shown - Whether elements of malicious prosecution present*

LIMITATION: *Accrual of cause of action - Action for negligence - Whether action filed within six years from date of alleged act of negligence*
G *- Whether suit premised on fraud - Whether action time-barred - Whether plaintiff could rely on s. 29(a) Limitation Act 1953*

The respondent ('the defendant bank') had given a hire purchase loan ('the loan') to Idyllic Management Service Sdn Bhd ('the
H company'). When the company defaulted in its repayment, the defendant bank commenced an action in the Sessions Court against the appellant ('the plaintiff'), as one of the guarantors of the loan. A judgment in default ('Sessions Court judgment') was obtained against the plaintiff but the latter failed to satisfy the said
I judgment. Subsequently, the defendant bank commenced bankruptcy proceedings against the plaintiff at the High Court and succeeded in obtaining receiving and adjudicating orders ('the High

Court orders'). Upon learning that he had been adjudged a bankrupt, the plaintiff complained to the defendant bank that he had never signed the guarantee agreement. The defendant bank then informed the plaintiff that the latter's liability in relation to the loan had been discharged and the High Court orders were annulled and rescinded pursuant to s. 105 of the Bankruptcy Act 1967. However, the plaintiff did not apply to set aside the Sessions Court judgment. A problem arose when the plaintiff attempted to travel but his passport was detained by an immigration officer and he was prevented from leaving the country on the ground that he was a bankrupt. The plaintiff then claimed against the defendant bank for torts of negligence and malicious prosecution but the claims were dismissed by the High Court. Hence, the present appeal. The issues that arose for the court's determination were: (i) whether the plaintiff's claim for negligence was time-barred; (ii) whether the plaintiff could rely on s. 29(a) of the Limitation Act 1953 ('the Act'); (iii) whether the defendant bank owed the plaintiff a duty of care; and (iv) whether the elements of malicious prosecution were present.

Held (dismissing appeal)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) Section 6 of the Act stipulated that the plaintiff must file his action within six years from the date of the alleged act of negligence. The guarantee agreement and the hire purchase agreement were both dated 7 May 1997. The six year period began from 7 May 1997. If at all there was any negligent act on the part of the defendant bank in failing to ensure the possibility of fraud happening, that negligent act would have occurred around 7 May 1997. Hence, the plaintiff's claim for negligence was time-barred as he filed the writ action only on 26 May 2011, which was some 14 years later. (paras 19 & 20)

(2) The plaintiff could not take advantage of s. 29(a) of the Act as his claim was not based on fraud but on negligence. The plaintiff could have sued the defendant bank for fraud since it was not possible for the alleged fraudulent act to have occurred without complicity on the part of the bank staff responsible for obtaining the signature of the guarantor onto the guarantee document. (para 22)

(3) The plaintiff failed to show that the defendant bank owed him a duty of care. The plaintiff was not a customer of the defendant bank and did not have an account there. He had not taken any loan from the defendant bank. In addition to that, the plaintiff submitted that the signature on the guarantee agreement was not his and denied that he was a guarantor of the hire purchase loan in favour of the bank. In other words, it was the plaintiff's pleaded case that he was a stranger to the bank and had nothing to do with the guarantee agreement or hire purchase agreement. If the plaintiff adopted such a position, then clearly there was no commercial relationship or some kind of proximity between the plaintiff and the defendant bank. As such the plaintiff could not, in the same breath, claim that the defendant bank owed him a duty of care. (paras 23 & 24)

(4) In an action for malicious prosecution, the claimant must show, *inter alia*, that he was prosecuted by the defendant, *ie*, that the law was set in motion against him by the defendant bank on a criminal charge. The plaintiff in the present case was never prosecuted on a criminal charge, and what was set in motion against him was a bankruptcy proceeding. Even assuming that the court were to examine the plaintiff's claim on the footing that his cause of action was actually the tort of malicious civil proceedings, the plaintiff must still show absence of reasonable and probable cause, of which were both present in this case. (para 34)

Bahasa Malaysia *Translation Of Headnotes*

Responden ('bank defendan') telah memberikan pinjaman sewa beli ('pinjaman tersebut') kepada Idyllic Management Service Sdn Bhd ('syarikat tersebut'). Apabila syarikat tersebut gagal membuat bayaran semula, bank defendan memulakan satu tindakan di Mahkamah Sesyen terhadap perayu ('plaintif'), sebagai salah seorang penjamin bagi pinjaman tersebut. Penghakiman ingkar ('penghakiman Mahkamah Sesyen') telah diperolehi terhadap plaintif tetapi dia gagal mematuhi penghakiman tersebut. Seterusnya, bank defendan memulakan prosiding kebankrapan terhadap plaintif di Mahkamah Tinggi dan berjaya memperolehi perintah-perintah penerimaan dan penghakiman ('perintah-perintah Mahkamah Tinggi'). Apabila mendapat tahu bahawa dia telah diisytiharkan sebagai seorang bankrap, plaintif membuat aduan kepada bank defendan bahawa dia tidak pernah menandatangani

perjanjian jaminan tersebut. Bank defendan kemudiannya memaklumkan kepada plaintif bahawa liabilitinya terhadap pinjaman tersebut dilepaskan dan perintah-perintah Mahkamah Tinggi telah dibatalkan di bawah s. 105 Akta Kebankrapan 1967. Walau bagaimanapun, plaintif tidak memohon untuk mengenepikan penghakiman Mahkamah Sesyen. Masalah timbul apabila plaintif bercadang untuk melancong tetapi pasportnya ditahan oleh pegawai imigresen dan dia dihalang keluar dari negara atas alasan bahawa dia seorang bankrap. Plaintif seterusnya membuat tuntutan terhadap bank defendan bagi tort kecuaian dan pendakwaan niat jahat tetapi tuntutan tersebut ditolak oleh Mahkamah Tinggi. Dengan itu, rayuan ini. Isu-isu yang timbul untuk pertimbangan mahkamah adalah: (i) sama ada tuntutan plaintif bagi kecuaian dihadkan oleh masa; (ii) sama ada plaintif boleh bergantung pada s. 29(a) Akta Had Masa 1953 ('Akta'); (iii) sama ada bank defendan mempunyai kewajipan berhati-hati terhadap plaintif; dan (iv) sama ada wujud unsur-unsur pendakwaan niat jahat.

Diputuskan (menolak rayuan):
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 6 Akta memperuntukkan bahawa plaintif mesti memfailkan tindakannya dalam masa enam tahun dari tarikh kecuaian yang didakwa. Kedua-dua perjanjian jaminan dan sewa beli bertarikh 7 Mei 1997. Tempoh enam tahun bermula dari 7 Mei 1997. Sekalipun terdapatnya tindakan cuai oleh bank defendan dalam kegagalannya memastikan kemungkinan berlakunya penipuan, kecuaian tersebut berkemungkinan berlaku sekitar 7 Mei 1997. Tuntutan kecuaian oleh plaintif dihadkan oleh masa kerana dia memfailkan tindakan writ pada 26 Mei 2011, iaitu 14 tahun kemudian.

(2) Plaintif tidak boleh mengguna pakai kelebihan s. 29(a) Akta memandangkan tuntutannya bukan berdasarkan penipuan tetapi kecuaian. Plaintif sepatutnya boleh mengambil tindakan terhadap defendan bank bagi penipuan kerana tidak mungkin dakwaan tindakan menipu tersebut berlaku tanpa penglibatan pihak kakitangan bank yang bertanggungjawab mendapatkan tandatangan penjamin dalam dokumen jaminan.

(3) Plaintif gagal membuktikan bahawa bank defendan mempunyai kewajipan berhati-berhati terhadapnya. Plaintif bukanlah pelanggan bank defendan dan tidak mempunyai akaun di situ. Dia tidak mengambil sebarang pinjaman daripada bank defendan. Tambahan, plaintif menghujahkan bahawa tandatangan dalam perjanjian jaminan bukan miliknya dan menafikan bahawa dia adalah penjamin pinjaman sewa beli bagi bank. Dalam kata lain, adalah kes plaintif bahawa dia merupakan orang asing kepada bank dan tidak mempunyai sebarang kaitan dengan perjanjian jaminan atau perjanjian sewa beli. Jika plaintif menyatakan sedemikian, maka jelas bahawa tiada hubungan komersil atau sebarang pendekatan antara plaintif dan bank defendan. Jika tiada hubungan atau pendekatan antaranya dengan bank defendan, plaintif tidak boleh, pada masa yang sama, mendakwa bahawa defendan mempunyai kewajipan berhati-hati terhadapnya.

(4) Dalam satu tindakan pendakwaan niat jahat, pihak yang menuntut mestilah membuktikan, antara lain, bahawa dia didakwa oleh defendan, iaitu tindakan undang-undang yang telah dimulakan oleh bank defendan terhadapnya adalah bagi pertuduhan jenayah. Plaintif dalam kes ini tidak pernah didakwa atas pertuduhan jenayah, dan undang-undang yang dimulakan terhadapnya adalah prosiding kebankrapan. Mengandaikan bahawa mahkamah meneliti tuntutan plaintif dalam kedudukan di mana kausa tindakannya adalah tort prosiding sivil pendakwaan niat jahat, plaintif masih perlu membuktikan ketiadaan kausa yang munasabah dan berkemungkinan, yang mana kedua-duanya wujud dalam kes ini.

Case(s) referred to:

Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***

Jacobs v. Vockrodt [2007] EWHC 2403 ***(refd)***

Johnson v. Emerson and Sparrow [1871] LR 6 Ex 329 ***(refd)***

Loh Chiak Eong & Anor v. Lok Kok Beng & Ors [2012] 9 CLJ 699 CA ***(refd)***

Saville v. Roberts 1 Ld Raym 374 ***(refd)***

Tetuan Bee Ling & Co lwn. Vijendran Ponniah [2010] 6 CLJ 643 CA ***(refd)***

Quartz Hill Consolidated Gold Mining Company v. Eyre [1883] 11 QBD 674 ***(dist)***

Legislation referred to:

Bankruptcy Act 1967, s. 105

Limitation Act 1953, ss. 6, 29(a)

Other source(s) referred to:
WVH Rogers, *Winfield & Jolowicz on Torts*, 15th edn, pp 678, 680
Clerk & Lindsell on Torts, 12th edn, pp 1070-1071

For the appellant - Mohaji Selamat (Nor Hazury Zubir with him); M/s Mohaji, Hazury & Ismail
For the respondent - Tan Gian Chung (Phua Zi Jin with him); M/s Shook Lin & Bok

[Appeal from High Court, Shah Alam; Civil Suit No: 22NCVC-626-2011]

Reported by Najib Tamby

JUDGMENT

Hishamudin Mohd Yunus JCA:

Introduction

[1] The plaintiff/appellant (Jaafar Mohd Khalid) appeals to this court.

[2] The High Court of Shah Alam had dismissed his claim against the defendant/respondent (Hong Leong Bank Bhd) for:

(a) the tort of negligence; and

(b) the tort of malicious prosecution.

Decision Of This Court

[3] In our judgment, this appeal must be dismissed.

Facts Of The Case

[4] In 2004 the defendant bank commenced a civil action against the plaintiff at the Sessions Court of Kuala Lumpur. The defendant bank sued him as one of the guarantors in respect of a hire-purchase loan given by the defendant bank to a company called 'Idyllic Management Service Sdn Bhd'. The plaintiff was a shareholder in the company. The purpose of the hire-purchase loan was for the purchase of a vehicle by the company. The company defaulted in its repayment to the defendant bank. The defendant bank went after the guarantors. On 15 April 2004, the defendant bank obtained judgment in default of appearance against the plaintiff.

[5] The plaintiff failed to satisfy the default judgment. So, on 23 October 2007 the defendant bank, armed with the Sessions Court default judgment order, commenced bankruptcy proceedings against the plaintiff at the High Court of Shah Alam *via* Bankruptcy No: 29-5716-2007. On 30 December 2009, the defendant bank succeeded in obtaining the receiving order and adjudicating order against the plaintiff.

[6] The plaintiff, subsequently, upon learning that he had been adjudged a bankrupt went to the defendant bank to complain that he had never signed any guarantee agreement involving the hire-purchase loan in question.

[7] After some meetings between the plaintiff and the officers of the defendant bank, on 8 June 2010, the defendant bank wrote a letter to the plaintiff stating:

> Sir,
>
> ACCOUNT : 148-83-00790-3
>
> BORROWER : JAFFAR BIN MOHD KHALID
>
> NRIC : 4446072/530502015551
>
> UNIT : WFQ2047
>
> CASE NO. : JPH(SEL)16477/2009/BN NO.29-5716-2007
>
> Reference is made to the above.
>
> Please take note that your liability in relation to the abovementioned account towards Messrs Hong Leong Bank Berhad has been discharged upon the investigation which has determined that the abovementioned borrower is not the actual guarantor of the vehicle bearing registration number WFQ2047. There shall be no further liability/claim in relation to the above matter with immediate effect.
>
> Thank you.
>
> Yours faithfully,
>
> On behalf of HONG LEONG BANK BERHAD

[8] On 5 October 2010, on the application of the defendant bank, the High Court of Shah Alam, pursuant to s. 105 of the Bankruptcy Act 1967, annulled the adjudicating order and rescinded the receiving order.

[9] However, the plaintiff never applied to set aside the default judgment of the Sessions Court of Kuala Lumpur obtained by the defendant bank against him.

The Plaintiff's Case

[10] The plaintiff is a businessman and a professional tourist guide.

[11] The plaintiff alleges that on 23 March 2010, at an immigration check-point at the Malaysia-Thailand border (the plaintiff does not provide the precise location) his passport was detained by an immigration officer and he was prevented from leaving the country on the ground that he had been adjudged a bankrupt.

[12] The plaintiff alleges that he had never signed any guarantee agreement as a guarantor in respect of the hire-purchase loan in question.

[13] He alleges that the 'guarantor signature' on the guarantee agreement was not his.

[14] The plaintiff alleges in his evidence that he was never served with the Sessions Court summons; however, this fact was never pleaded by him in his statement of claim. All he said in his statement of claim was that he was not aware of the judgment and the bankruptcy proceedings (... tidak tahu langsung mengenai penghakiman dan prosiding kebankrapan ...) (see para. 10 of his statement of claim).

[15] The plaintiff filed the instant writ action against the defendant bank for negligence and malicious prosecution on 26 May 2011, claiming special damages, general damages, aggravated damages and exemplary damages.

The Defendant's Case

[16] The plaintiff was one of the guarantors of the hire-purchase loan and that all cause papers in respect of the Sessions Court proceedings and the Shah Alam High Court bankruptcy proceedings were duly served on the plaintiff at his last known address in accordance with the law.

[17] The bankruptcy proceedings was done in good faith based on the Sessions Court default judgment. The plaintiff never applied to set aside the default judgment.

The Claim Under The Tort Of Negligence

[18] We are dismissing this claim because of the following reasons.

[19] Firstly, we agree with the learned High Court Judge that the plaintiff's claim for negligence is time barred. The claim is for the tort of negligence. Where the claim is for the tort of negligence, then, s. 6 of the Limitation Act 1953 applies. Section 6 provides:

> Limitation of actions of contract and tort and certain other actions.
>
> 6. (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say -
>
> (a) actions founded on a contract or on tort;

[20] This means that the plaintiff must file his action within six years from the date of the alleged act of negligence. When did the alleged act of negligence occur? In his 'Particulars of Negligence', the plaintiff alleges that the act of negligence occurred when the defendant bank in processing the hire-purchase documentation failed to ensure that there was no fraud and that the signature in the guarantee agreement was indeed that of the plaintiff. The guarantee agreement is dated 7 May 1997. The hire-purchase agreement is also dated 7 May 1997. Thus the processing of the guarantee and hire purchase agreements must have taken place around this time, that is to say, 7 May 1997. If at all there is any (alleged) negligent act on the part of the defendant bank in failing to ensure the possibility of fraud happening in the processing of the hire-purchase loan was minimised, or in failing to detect any irregularity or fraudulent act in the hire-purchase approving process, that negligent act could only have occurred around 7 May 1997. So the six year period begins from 7 May 1997. And if the six year period begins from 7 May 1997, then, plaintiff is clearly time barred as he filed the writ action only on 26 May 2011, that is to say, some 14 years later.

[21] However, the plaintiff contends in para. 17 of his memorandum of appeal and at pp. 24-25 of his written submission that time begins to run only from the time when the plaintiff

became aware of the alleged fraud; and that the plaintiff became aware of the alleged fraud only in March 2010 when he was prevented from leaving the country by the immigration department by reason of his bankruptcy. The plaintiff relies on s. 29(a) of the Limitation Act. According to this provision:

> Postponement of limitation period in case of fraud or mistake
>
> 29. Where, in the case of any action for which a period of limitation is prescribed by this Act, either:
>
> (a) the action is based upon fraud of the defendant or his agent or of any person through whom he claims or his agent;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistakes as the case may be, or could with reasonable diligence have discovered it;

[22] With respect, the plaintiff cannot take advantage of this provision as his claim is not based on fraud but based on negligence. On the facts, the plaintiff could have sued the defendant bank for fraud, since it is not possible for the alleged fraudulent act to have occurred without complicity on the part of the bank staff responsible for obtaining the signature of the guarantor onto the guarantee document. But for reasons best known to itself, the plaintiff chose not to, and instead preferred to sue the defendant bank for negligence.

[23] Our second ground in dismissing the plaintiff's claim for the tort of negligence against the defendant bank is that the plaintiff has failed to show that the defendant bank owes him a duty of care. In the House of Lords case of *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 Lord Bridge of Harwich summarised the principle on duty of care as follows:

> What emerges is that, in addition to the foresee ability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable and that the law should impose a duty of a given scope upon the one party for the benefit of the other.

[24] In the present case, it is common ground that the plaintiff is not a customer of the defendant bank. He has no account with the defendant bank. He has not taken any loan from the defendant bank. In addition to this fact, and more pertinent, the

plaintiff in his pleading denies that he is a guarantor of the hire-purchase loan (involving Idyllic Management Services Sdn Bhd) in favour of the defendant bank; and that the signature on the guarantee agreement is not his. In other words, it is the plaintiff's pleaded case that he is a stranger to the bank; and has nothing to do with the guarantee agreement or hire purchase agreement. His complain is only that the defendant bank was careless in processing the guarantee agreement, thereby allowing fraud to have taken place; resulting in the plaintiff, without his knowledge, being fraudulently named as a guarantor. If the plaintiff adopts such a position, then, clearly there is no commercial relationship or some kind of proximity between the plaintiff and the defendant bank. If the plaintiff takes the position that there is no relationship or proximity between him and the defendant bank, he cannot in the same breath claim that the defendant bank owes him a duty of care.

[25] We just would like to add that it might well be that the defendant bank could have foreseen that any careless act on its part in not ensuring that fraud did not take place, when it came to processing the guarantee agreement, might result in fraud taking place and consequential financial injury to some innocent third party. However, in *Loh Chiak Eong & Anor v. Lok Kok Beng & Ors* [2012] 9 CLJ 699; [2013] 1 MLJ 27 the Court of Appeal has ruled that (at pp. 716-717 (CLJ); p. 41 (MLJ):

> We are, however, prepared to accept the plaintiff's contention that the defendants, as the architects of the project, would be able to foresee that the various acts or omissions complained of, assuming for the moment that the allegations to some extent are true, would result in a delay in obtaining the CFOs and consequential financial loss to the plaintiffs. But 'foreseeability of harm or damage' is not the only test or factor in determining the existence of a duty of care. In other words, as a matter of law, foreseeability of injury or damage does not automatically lead to a duty of care (see *Simaan Contracting Co v. Pilkington Glass Ltd (No 2)* [1988] QB 758; and *Man B & W Diesel*). As a matter of law, there are other considerations to be taken into account as well.

The Claim Under The Tort Of Malicious Prosecution

[26] The plaintiff also claims against the defendant bank for the tort of malicious prosecution by reason of the bankruptcy proceedings commenced against him by the defendant bank. The plaintiff submitted that there was an absence of reasonable and probable cause since the plaintiff was never a guarantor to the

hire-purchase agreement in question, and that the bankruptcy order was eventually annulled and rescinded by the court on the defendant bank's own application.

[27] The history of the tort of malicious prosecution can be traced back to the writ of conspiracy which was in existence as early as the reign of the English King Edward I. The cause of action came to be known as malicious prosecution only during the reign of Queen Elizabeth I. It was put on firm footing in 1698 in *Saville v. Roberts* 1 Ld Raym 374.
(see *Winfield & Jolowicz on Torts*, 15th edn by WVH Rogers, p. 678).

[28] According to *Winfield & Jolowicz on Torts* (at p. 678):

> Liability for malicious prosecution has always had to steer a path between two competing principles - on the one hand the freedom of action that everyone should have to set the law in motion and to bring criminals to justice and on the other hand the necessity to check lying accusations against innocent people.

[29] In our judgment, this claim for the tort of malicious prosecution must also be dismissed. In an action for malicious prosecution, the claimant must show, among other things, that he was prosecuted by the defendant, that is to say, that the law was set in motion against him by the defendant on a criminal charge (*Clerk & Lindsell on Torts*, 12th edn., pp. 1070-1071, para. 16-09; see also *Winfield & Jolowicz on Torts* at p. 680). The plaintiff in the present case was never prosecuted on a criminal charge. What was set on motion against him was a bankruptcy proceeding.

[30] The plaintiff, however, relies on the case *Quartz Hill Consolidated Gold Mining Company v. Eyre* [1883] 11 QBD 674 CA to argue that a bankruptcy proceedings against the plaintiff can be a basis for the tort of malicious prosecution. With respect, we are unable to accept this argument: *Quartz Hill Consolidated Gold Mining* is no authority for such a proposition. This case that is cited is a case of the tort of malicious civil proceeding and not a case of the tort of malicious prosecution. In this case cited the issue was whether an action would lie for falsely and maliciously and without reasonable or probable cause presenting a petition to wind up a company, although the company had suffered no pecuniary damage besides the payment of extra costs.

[31] The plaintiff also relies on the Court of Appeal case of *Tetuan Bee Ling & Co lwn. Vijendran Ponniah* [2010] 6 CLJ 643 for the proposition that the tort of malicious prosecution can be based on a bankruptcy proceedings that terminated in the plaintiff's favour. With respect, in this case cited, the majority judgment clearly appreciates the difference between the tort of malicious prosecution and the tort of malicious civil proceedings (or malicious proceedings in bankruptcy); for the Court of Appeal said (at p. 656):

> [13] Daripada keputusan-keputusan kehakiman tersebut di atas bolehlah dirumuskan bahawa terdapat banyak persamaan di antara tindakan bagi ganti rugi kerana kecederaan yang diakibatkan oleh permulaan sesuatu prosiding kebankrapan secara niat-jahat dan tanpa sebab munasabah dengan tort pendakwaan niat jahat yang terbit daripada pertuduhan jenayah.

[32] In *Tetuan Bee Ling & Co* the causes of action preferred by the plaintiff there did not include the tort of malicious prosecution but:

(a) the tort of malicious civil proceeding (or malicious proceeding in bankruptcy); and

(b) the tort of abuse of process.

[33] That is why the court based its decision on *Johnson v. Emerson and Sparrow* [1871] LR 6 Ex 329 and *Quartz Hill Consolidated Gold Mining*. Both these cases were not cases of malicious prosecution. We have explained the cause of action in *Quartz Hill Consolidated Gold Mining*. *Johnson v. Emerson and Sparrow* is a case of malicious proceedings in bankruptcy.

[34] However, even assuming we are to examine the plaintiff's claim on the footing that his cause of action is actually the tort of malicious civil proceedings (or, malicious proceedings in bankruptcy), still the plaintiff must show absence of reasonable and probable cause (see *Jacobs v. Vockrodt* [2007] EWHC 2403 (QB); and *Johnson v. Emerson and Sparrow*). In the instant case it clearly cannot be said that there is absence of reasonable and probable cause as the bankruptcy proceedings was commenced by the defendant bank based on the Sessions Court default judgment which the plaintiff has never thought it fit to have it set aside. As

long as the plaintiff has not applied to set aside the default judgment, there is in existence a valid default judgment. Indeed, the plaintiff has never pleaded that he was never served with the Sessions Court summons. And as long as there is a valid judgment on which the bankruptcy proceedings is based, the defendant bank has a valid basis for commencing the bankruptcy proceedings. All the more so in the present case where the evidence shows that the plaintiff made the defendant bank aware of the possibility of alleged fraud having had taken place much later after the commencement by the defendant bank of the bankruptcy proceedings.